IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 778 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NARSINHBHAI R VASAVA

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Petitioners

Mr.K.P.Raval, Addl.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 04/05/98

ORAL JUDGEMENT (Per Soni J.)

Appellants, original accused in Sessions Case No.273 of 1990, are held guilty of the offences referred hereunder and are ordered to undergo the sentences referred hereunder, by judgment and order dated 30.9.91

passed by learned Additional Sessions Judge,Surat. Appellant no.1, accused no.1, is held guilty of the offences punishable under sections 302 of I.P.C.; 323 read with sec.34 I.P.C.; 337 read with sec.34 of I.P.C, and 135 of Bombay Police Act and is ordered to undergo respective sentences of R.I. for life; R.I. for one month and fine of Rs.100/-, in default S.I. for 15 days; R.I. for one month and fine of Rs.100/-, in default S.I. for 15 days and R.I. for four months and fine of Rs.100/-, in default S.I. for 15 days. Appellant no.2, accused no.2, is held guilty of the offences punishable under sections 302 read with sec.34 I.P.C.; 323 I.P.C.; 337 I.P.C. and 135 of Bombay Police Act and is ordered to undergo respective sentences of R.I. for life; R.I. for two months and fine of Rs.200/-, in default S.I. for one month; R.I. for three months and fine of Rs.200/-,in default S.I. for one month and R.I. for four months and fine of Rs.100/-, in default S.I. for 15 days. All the substantive sentences are ordered to run concurrently in cases of both the appellants - accused.

Appellants are son and father respectively. Appellant no.1 had married with one Gajri, cousin sister of deceased Amarsing. Field of Amarsing is situated on the east at a distance of half a kilometer away from the village. House of the father of deceased is situated at a distance of about 60' north-south while house of accused is situated at a distance of 120' south-west of the house of deceased. The matrimonial life of accused no.1 and his wife Gajri was passing in rough weather and accused no.1 was beating his wife. When the deceased returned from his field on 5.9.90, he went to the house of accused no.1, as accused no.1 and his wife were quarrelling. Deceased reprimanded accused no.1 and, therefore, accused no.1 and his father were annoyed and rushed to assault the deceased, who ran towards his house. When deceased reached near his house, accused no.1 inflicted an axe blow on his head and accused no.2 inflicted a stone blow on the deceased. Deceased fell down there and died there and then. As the incident took place in front of the house of deceased, his wife Bai Babli P.W. 2, who was just waiting for the deceased in her court yard, saw the incident. At the time when axe blow was inflicted on the deceased, P.W. 2 Bai Babli shouted and father and mother of deceased rushed to the house of deceased and found deceased lying there dead. Ramsing Verasia, brother of the deceased,then went to Junkhvav, where Police Inspector of Mangrol was camping, by about 20.00 hours of night and lodged the complaint. On receipt of the complaint, the same was sent to Mangrol for registration and Digvijaysinh P.W. 9 commenced the investigation. On completion of the investigation, both

the accused were chargesheeted in the court of J.M.F.C. Mangrol, who, in his turn, committed the case to the court of Sessions at Surat. The learned Additional Sessions Judge, Surat framed charge against the accused on 26.3.91 under sections 302, 337, 323 and with sec.34 of I.P.C. and sec.135 of Bombay Police Act. After the trial commenced, the learned Judge has amended the charge by his order dated 10.5.91 vide Ex.33. Initially, in charge Ex.2, stone was ascribed to accused no.1 and axe was ascribed to accused no.2. In the course of evidence, it transpired that it is the mistake and, therefore, the charge was amended and by amended charge, axe was ascribed to accused no.1 and stone was ascribed to accused no.2. Except this change in weapon as ascribed to the accused, rest of the charge has remained unaltered.

Accused pleaded not guilty and claimed to be tried. Learned Special Additional Public Prosecutor led necessary evidence and on completion of the same, statements of the accused under sec.313 of the Code of Criminal Procedure, 1973 were recorded. From the tenor of cross-examination of the witnesses as well as the further statements of the accused, the defence of the accused, as it appears, is of total denial. According to them, they are wrongly involved in the case because of strained relation of accused no.1 with his wife, who happened to be the cousin sister of the deceased. No defence witness is examined by the accused. The learned Additional Sessions Judge, after hearing the parties, held the accused guilty of the offences referred above and sentenced them, as referred above. Against this judgment and order, the present appeal is filed.

Learned Advocate Mr.P.M.Vyas appearing for the accused contended that the judgment and order of the learned Additional Sessions Judge is not legal and proper. Mr.Vyas contended that in view of the contradictions in the evidence of prosecution witnesses, their evidence is not worth credence and the learned Additional Sessions Judge should not have relied on the same. Mr.Vyas also contended that the very fact of amendment of charge causes suspicion in the case of the prosecution. Bai Babli P.W. 2 has conveyed information to P.W.1, who has given the complaint and in the complaint, he has ascribed stone to accused no.1 and axe to accused no.2 while in the evidence the weapon is changed from accused no.1 to accused no.2 and from accused no.2 to accused no.1. This by itself suggests that Bai Babli is not an eye witness as it turns out before the court now. Thus, when it is not certain as to who held what weapon, then the principle of minimum liability should arise and the accused should be given

benefit thereof. Mr.Vyas further contended that in any circumstances of the case, accused no.2 cannot be held guilty of offence punishable under sec.302 read with sec. 34 I.P.C. Mr.Vyas also contended that either of the accused cannot be held guilty of offence punishable under section 323 or 337 read with sec.34 of I.P.C. Mr.Vyas contended that the learned Judge has confused in passing the order of conviction both under sec.323 as well as under sec.337 of I.P.C. Mr.Vyas, therefore, contended that the appeal should be allowed and, in the alternative, at least the conviction and sentence of accused no.2 requires alteration to only under sec.323 I.P.C.

Learned A.P.P. Mr.Raval supports the judgment. Mr.Raval contended that whatever stated by P.W. 1 in his complaint was as he heard from Bai Babli P.W.2 and, therefore, evidence or say of P.W. 1 is a hear-say and the same would not be admissible, unless the same is confirmed by Bai Babli P.W. 2. When Bai Babli specifically states, and also corroborated by other witnesses, that accused no.1 had an axe and accused no.2 had a stone, there is no reason not to believe Bai Babli and based on that part if the charge is amended, defence cannot take advantage thereof. Mr.Raval contended that the charge is meant for a proper direction to the parties for a case, to which they are required to met. Though in unamended charge accused no.1 is ascribed stone and accused no.2 is ascribed axe, all the witnesses refer and ascribe axe to accused no.1 and stone to accused no.2 and to put the record straight when the learned Judge has amended the charge, it is not for the benefit of the accused. Unless the accused show that they were prejudiced by the amendment of the charge, the amended charge cannot be said to be for the benefit of the accused. Mr.Raval further contended that there is unimpeachable, cogent and convincing evidence of Bai Babli alone, coupled with medical evidence, to hold accused no.1 guilty of offence punishable under sec.302 I.P.C. Incident took place in broad day-light at 2.00 PM in front of the house of the deceased at a distance of about 4 to 5' from where Bai Babli was standing. Her immediate conduct also supports her say and, therefore, learned Judge has rightly accepted her evidence. Mr.Raval further contended that accused no.2 had a common intention to injure and kill the deceased; otherwise there was no reason for him to accompany the accused no.1 with stone and to inflict stone blow, when accused no.1 had already inflicted an axe blow. Mr.Raval further contended that in the facts of the case when father and son together rushed to the house of deceased and when accused no.2 inflicted stone injury, sec.337 of I.P.C.

is attracted, as held by the learned Judge. He also contended that conviction under section 323 I.P.C. of accused no.2 and sec.302 read with sec.34 I.P.C. is also legal and proper. Mr.Raval fairly conceded that sec.135 of the Bombay Police Act may not be attracted qua accused no.2, but has rightly been attracted qua accused no.1 and, therefore, the judgment of the learned Judge except the modification of sec.135 of Bombay Police Act requires to be accepted and/or confirmed.

To appreciate the diverse contentions of the learned Advocates, it will be relevant to refer to the scene of offence. It is undisputed that the incident has taken place at 2.00 P.M. of 5.9.90 at village Velavi Amba. Village Velavi Amba is at a distance of 1 1/2 kms from village Kevda. Village Kevda is at a distance of 15 kms from Junkhvav and Junkhvav is at a distance of 20 kms from Mangrol. In village Velavi Amba, house of deceased Amarsinh is situated. Deceased's uncle's daughter Gajri is married with accused no.1 Narsinhbhai and their house is at a distance of about 120' south-west of the house of deceased. House of Verasia i.e. father of the deceased, is located at a distance of about 60' north-east of the house of deceased. Keeping these locations in mind, we will now refer to the evidence of Bai Babli, P.W. 2, widow of deceased.

Bai Babli P.W. 2 has stated that:

"On full-moon day of Badarva last, my husband was assaulted. My husband asked Narsinhbhai accused no.1 as to why are you beating his sister Gajri. Narsinhbhai and Ramsing, therefore, came running. Narsinhbhai had an axe and Ramsinh had a stone in their hands. I was standing near my ota at that time. My husband was also present near ota outside the house. Narsinhbhai inflicted axe blow on the rear of head of my husband. Edged part of axe was inflicted ..... As my husband was assaulted, I shouted. My father-in-law and mother-in-law, therefore, came. When my father-in-law told Ramsing, Ramsing gave two slaps to my father-in-law. My husband had fallen down there near door. My husband was bleeding from head. My husband moved a little and then died. My mother-in-law, therefore, called my elder brother-in-law. Police Patel and Sarpanch were also called and my elder brother-in-law, in company of Sarpanch and Police Patel, went to Mangrol to lodge the complaint. I did tell about the incident to these persons also".

This witness has seen the incident at a distance of 4 to 5', which occurred in front of her house in the noon time of the day. On her shout, her father-in-law and

mother-in-law had arrived and her mother-in-law also called her elder brother-in-law, who, in his turn, called the Police Patel and Sarpanch. To all these persons, she has narrated as to what had happened. Keeping all this in mind, we will see as to what she has stated in her cross-examination. She has stated in cross-examination:

> "..... In the noon, my husband came home. He had not taken his lunch. In the meantime, accused came. When accused came, my husband told them as to why are you beating his sister".

She denies that her husband had gone to the house of the accused. She states that it is true that Amarsing has never gone out after he came with a bundle of grass. She has denied the suggestion in the cross-examination that her husband had slipped down and thereby the stone had struck on the head. Her father-in-law was given two slaps by accused No.2. She has admitted to have stated before the Police that her husband was standing near the house of Ramsing Chhedadiya and he was telling the accused as to why they quarrel with his sister. Ramsing Chhedadiya told him that he should not try to be wise in his house. She has stated that verbal exchange between accused no.1 and accused no.2 and her husband took place at her house itself. She denied that there was any scuffle between the two and, therefore, he was injured. She denies that she has not stated that the blow with edged portion of the axe was inflicted. Bai Babli in her cross-examination has stated that "I have not told my elder brother-in-law or the Police Patel that Ramsing inflicted axe blow and Narsinhbhai inflicted stone blow". Keeping this evidence in mind, if we look at the map Ex.15 and the fact that the incident has taken place in front of the house of deceased in the noon time at 2.00 PM when Bai Babli is supposed to be and presumed to be in the house, there is no reason to disbelieve her say that she was waiting for her husband for lunch. Therefore, she must have seen the commission of the incident and looking to her cross-examination, nothing has been extracted to disbelieve her. Not only that, but she has immediately talked about the same to her elder brother-in-law P.W.1, who has narrated the very fact in the complaint and also before the court, except the variance of weapon, which appears to have been, either by some misunderstanding or by some mistake, weapons changed the hand i.e. the weapon ascribed by Bai Babli P.W.2 to accused no.1 is stated by P.W.1 to be in the hand of accused no.2 and the weapon ascribed by Bai Babli P.W.2 in the hand of accused no.2 is stated by P.W.1 in the hand of accused no.1. But whatever was stated by Bai Babli P.W. 2 to Ramsing P.W.1 and Ramsing P.W.1 stated before the Police in complaint Ex.19 was hear-say and not

admissible in evidence, unless so admitted by P.W.2 Bai Babli. What P.W. 2 states, in our opinion, is the evidence admissible in evidence and as it is corroborated in other facts by P.W. 1 and complaint at Ex.19, we do not find any reason not to accept the evidence of P.W. 2.

Evidence of P.W. 2, in our opinion, is further corroborated by the evidence of P.W.3 and P.W.4, father-in-law and mother-in-law of Bai Babli, who have come to the scene of offence and to whom she has narrated the incident. P.W.3 and P.W.4 have tried to pose themselves as eye witnesses, but we do not accept them as eye witnesses in view of their statements before the Police, as so much of the facts stated by them to pose themselves as eye witnesses, were not stated before the Police in the Police statements. However, the fact remains that when they reached near the house of deceased, deceased was lying there and they have seen the accused with respective weapons, namely axe and stone in their hands. In our opinion, evidence of P.W. 3 is further corroborated by the fact that when he reached the scene of offence after the incident took place, accused no.2 gave him two slaps and except challenging the same in the cross-examination saying that he is telling lie about slaps, nothing more has been extracted. Giving of two slaps to P.W. 3 by accused no.2 is also stated by P.W.2 and P.W. 4. Therefore, arrival of P.W.3 and P.W. 4 at the scene of offence on hearing the shouts of P.W. 2 and P.W. 2 narrating the incident to them is not in dispute. Therefore, the incident, which is narrated to P.W.3 and P.W.4, in our opinion, also corroborates the evidence of P.W. 2 by conduct of P.W. 2.

It is in evidence that on shouts raised by P.W. 2, her elder brother-in-law came, who, in his turn, has called P.W. 5 Sarpanch and also Police Patel, to whom necessary facts were immediately disclosed. P.W.5 in his evidence has referred to that very fact, as narrated by P.W. 2. Therefore, in our opinion, P.W. 2 is also corroborated by the evidence of P.W.5, whose evidence, in our opinion, has stood the test of cross-examination and nothing has been extracted whereby his evidence either requires to be rejected or casts any doubt in the story of the prosecution. Thus, in our opinion, so far as the injury on the person of deceased by accused nos.1 and 2 are concerned, the prosecution has duly established the same.

It is the case of the prosecution that accused no.1 inflicted axe blow on the head of deceased and accused no.2 inflicted stone blow on the head of deceased. From the evidence of Dr.Ramesh P.W.7, it is clear that there are two external head injuries on the

person of the deceased. Those two injuries are:-

"(1) Cut & Split lacerated on upper occipital region, slightly oblique in direction involving both (Rt) and (Lt) occipital region.

Size: 6 cm x 0.7 cm x bone deep. Edges are irregular and bruised margins are abraded. Blood clot present.

(2) Haematoma over (Lt) occipital region about 4 cm below the above injury. Size: 5 x 4 cm"

There are corresponding four internal injuries, which are as under:-

"1. Scalp haematoma over (Lt) side of lower part of occipital region - size: 5 x 3 cm dark red in colour and soft in nature.

2. Linear fissure fracture over mid occipital area slight above to occipital prominence coursing down to (Lt) occipital bone. Size: 4 cm long with a depressed fracture at upper angle of wound. Size of depressed fracture: 2 cm x 0.4 cm.

3. Haematoma below occipital prominence. Size: 4 x 2 cm. dark red in colour and soft in nature.

4. Underline Dura & Meninges are torn at fracture site with sub-dural and extradural haematoma".

External injury No.1 can be caused by article like axe produced before the court and external injury no.2 is also possible by article like stone produced before the court. Internal injuries nos.2, 3 and 4 are corresponding to external injury no.1 and external injury no.2 is corresponding to internal injury no.1. According to the doctor, external injury no.1 and corresponding internal injuries are sufficient in the ordinary course of nature to cause death while external injury no.2 and corresponding internal injury is not sufficient to cause death.

Axe and stone both were recovered from the respective accused and were sent to forensic science laboratory, as they were found stained with blood. As per the report of Forensic Science Laboratory, blood found from the scene of offence is of 'A' group and blood found from stone and axe is also of human blood of 'A' group. Blood of the deceased was taken and it is also found to be of 'A' group. Even if we assume and do not accept the evidence as to recovery of the stone and axe, then also injuries found on the person of deceased are proved to be by weapons like axe and stone and, therefore, when there is a convincing ocular evidence as to the weapon by which the injuries are caused, we do not find any reason not to accept the evidence of eye witness, namely, P.W. 2.

By the evidence of P.W.7 and the injuries

referred hereinabove, it is clear that deceased has died a homicidal death. This fact is also not disputed at all by learned Advocate for the appellants - accused.

Question is what offence is committed and by which accused ? From the evidence of P.W. 2, it is clear that while she was standing near her house, accused came there and inflicted axe blow and stone blow on the head of deceased, as a result of which he fell down and died there. When on hearing the shouts of P.W. 2 her father-in -law came, accused no.2 gave him two slaps. A suggestion is made in the cross-examination that deceased had gone to the house of accused and has returned back, rushing to his own house, meaning thereby that something wrong had gone on in the house of accused, which made the deceased to run away. Be it so, the fact remains that near the house of deceased, accused no.1 had inflicted axe blow and accused no.2 inflicted stone blow. Axe injury has been fatal and stone injury is not fatal one. Learned Additional Sessions Judge has convicted accused no.1 of offence punishable under sec.302 I.P.C. In view of the evidence of P.W. 2 and P.W.7 Dr.Ramesh, case of accused No.1 would fall in clause Thirdly of section 300, as there is nothing on record to show that the blow was not intended and any of the exceptions are attracted in the instant case.

Now, the question remains as to whether the conviction of accused no.2 under sec.302 read with sec.34 I.P.C. is legal and proper. In view of the evidence on record, accused no.2 had gone with accused no.1 to the house of deceased. Accused no.2 had given stone blow on the head of deceased. Injury caused by stone is not fatal one. It is not an injury, which can be said to be a bleeding one. Except Haematoma, no injury by that blow is caused. If we look at that injury, keeping aside the injury caused by accused no.1 by axe, it is only a simple injury and the case of accused no.2 would fall in provisions of sec.323 I.P.C. only or as suggested by learned A.P.P. under sec.324 I.P.C. Question is how sec.34 is attracted to convict accused no.2 under sec.302 read with sec.34 I.P.C. If we read sec.34, it requires for the prosecution to establish that a criminal act is done by several persons in furtherance of the common intention of all. Question is what is there on record to show that both the accused have committed an act, which is a criminal one, and the same was in furtherance of the common intention ? What was the common intention of two ? If we read the evidence of Bai Babli P.W. 2, it is clear that accused nos.1 and 2 told deceased, when he enquired or when he asked as to why accused no.1 is beating his wife, who happens to be his sister, not to interfere in their family affairs. So saying, they have

rushed behind the deceased. It is not disputed that incident has taken place in front of the house of the deceased. There is no explanation worth the name by the accused as to what made them to go to the house of deceased and that too with an axe and a stone at noon time. If the sister of the deceased, who happened to be the wife of accused no.1 was beaten, in our opinion, deceased had all the right to enquire and even tell the accused no.1 as to why he is ill-treating his sister, be she a cousin sister. If on enquiry the reply is of axe injury and stone injury, it cannot be said that both had a common intention. No doubt, they had an intention to teach a lesson to the deceased, as, according to them, deceased is enquiring about beating of wife of accused no.1 and interference in their personal affair. Therefore, their common intention was not to kill and in the instant case, sec.34 is not attracted at all. Thus, conviction of accused no.2 under sec.302 read with sec.34 I.P.C. is not legal and proper. So also conviction of accused no.1 under sec.323 read with sec.34 I.P.C. is not legal and proper.

Learned Additional Sessions Judge has also convicted both of them under sec.337 of I.P.C. When accused are convicted of sec.323 read with sec.34 and sec.323 I.P.C. respectively and also under sec.302 and sec.302 read with sec.34 I.P.C., in our opinion, sec.337 I.P.C. will not be attracted on the facts of the present case. Therefore, in our opinion, conviction under sec.337 of accused no.2 and under sec.337 read with sec.34 I.P.C. of accused no.1 is not legal and proper.

It is proved vide Ex.25 that there was a ban to hold and move with weapons like stick, sword, baton, rifle, knife or any instrument, which may cause injury to a person during the period of 13.8.90 and 6.9.90 in the area of Surat District, except Police commissionerate area. Incident took place on 5.9.90. Village Velavi Amba is under Mangrol taluka of Surat District and, therefore, notification of 10.8.90 issued by the District Magistrate, Surat is applied to that village. It is proved that accused no.1 had inflicted axe blow on the person of deceased. Therefore, he must be holding axe, even if we do not accept the seizure thereof. He has, therefore, committed breach of that notification and thereby there is a breach of sec.37(1) and (2) of Bombay Police Act, punishable under sec.135 of the said Act. In our opinion, stone will not be covered under that notification and, therefore, learned Additional Sessions Judge has erred in holding accused no.2 guilty of sec. 135 of Bombay Police Act.

Thus, evidence of P.W.2, being supported by the

evidence of P.W.3, P.W.4 and P.W.5 as well as P.W.1 is cogent and convincing. However, as discussed above, accused no.2 cannot be held responsible for the murder of deceased.

In view of the above discussion, the appeal is partly allowed.

Appeal of appellant no.1 - accused no.1 against the conviction under sections 323 and 337 read with sec.34 I.P.C. is allowed. Appeal of appellant No.1 accused no.1 against the order of conviction and sentence under section 302 I.P.C. and under sec.135 of Bombay Police Act is dismissed.

Appeal of appellant no.2 - accused no.2 against the conviction under sec.302 read with sec.34, sec.337 of I.P.C. and sec.135 of Bombay Police Act is allowed. Appeal of appellant no.2 - accused no.2 against the conviction and sentence under sec.323 of I.P.C. is dismissed.

Fine paid, if any, for the conviction, which is set aside, be refunded.

Order accordingly.
